

5 Official Opinions of the Compliance Board 184 (2007)

**NOTICE APPLICABILITY – NOTICE OF “CONTINUED”
MEETING, HELD TO BE REQUIRED – CLOSED SESSION
PROCEDURES – VOTING – FAILURE TO VOTE TO
CLOSE “CONTINUED” MEETING, HELD TO BE A
VIOLATION – WRITTEN STATEMENT – ONE-WEEK
DELAY IN PROVIDING ACCESS, HELD TO BE A
VIOLATION**

September 18, 2007

*Peter Heck
Kent County News*

The Open Meetings Compliance Board has considered your complaint alleging that the Mayor and Council of Chestertown (hereafter “Council”) violated the Open Meetings Act in connection with closed sessions on April 11 and 16, 2007. Specifically, the complaint alleged that the Council failed to give reasonable advance notice of the meeting, hold its vote to close the session in public, and make the written statement regarding the closed session available when requested.

For the reasons explained below, we find that the Council violated the Act as alleged.

I

Complaint and Response

Following the regular meeting on April 2, the Mayor called an executive session “to discuss personnel and contractual matters,” the latter relating to discussions with the Eastern Shore Land Conservancy (“ESLC”). The minutes reflected that a decision was made to meet with the ESLC in an “executive session” on April 11. The April 2 session adjourned at 8:10 p.m.

The complaint indicated that, on June 18, you requested the closed meeting documentation for the April 11 meeting and were provided with documents captioned “Summary Executive Session April 2, 2007” and “Summary Executive Session April 11, 2007.” The latter document addressed not only the closed session on April 11 but a continuation of discussions during a closed session on April 16. On June 25, you requested from the Council’s stenographer copies of the closing statements for the three sessions. While you were provided a statement for April 2,

the complaint noted that you were told statements for the latter two sessions were unavailable. On July 2, you spoke with the Town Manager, who indicated that the April 2 session had not been adjourned; hence, the two subsequent sessions were continuations of that meeting. Copies of the closing statements for April 11 and 16 were provided to you at a regular Council meeting that evening. Copies of these closing statements, among other documents, were appended to the complaint. The complaint alleged three violations relating to the April 11 and 16 sessions, which we have reordered for purposes of our analysis: (1) failure to give reasonable advance notice of the meeting (§10-506(a));¹ (2) failure to vote in a public session before closing the meeting (§10-508(d)(2)(i)); and (3) failure to make the closing statement available on request (10-508(d)(4)).

In a timely response on behalf of the Council, Stewart Barroll, municipal attorney for Chestertown, submitted copies of the minutes for each closed session, April 2, 11, and 16.² According to the Council's response, the closing statements submitted with the complaint and the minutes demonstrate that, "on April 2, 2007, following the regular meeting of the Mayor and Council, the Council had properly gone into Executive Session to discuss a contractual real estate matter involving a Memorandum of Understanding being proposed by the [ESLC]." Acknowledging that the April 11 and 16 sessions were held "without the formality of further notice," the response argued that, because "the public was aware of the Executive Session since April 2 and the same session was simply continued [on the] two additional dates, the Town did not believe it was necessary to issue additional formal notices to the public." According to the response, the practice followed is not prohibited by the Act. However, Mr. Barroll has advised the Council that "the better practice is to give separate public notice even of continued Sessions"

II

Analysis

A. Notice

"Before meeting in closed or open session, a public body shall give reasonable advance notice of the session."§10-506. This requirement applies to

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

² Subject to limited exceptions not applicable here, minutes of meetings closed under provisions of the Act remained sealed unless the public body chooses to make them public. §10-509(c)(3) and (4). The Compliance Board is required to maintain the documents' confidentiality. §10-502.5(c)(2)(iii).

every meeting. The mere fact that a closed meeting is to be held may be important to those in the press and public who are following a public body's deliberations on an issue.

For the reasons stated in 4 *OMCB Opinions* 155, 158 (2005), we reject the argument that, assuming a meeting is "continued" from one date to another, notice is not required.³ Were we to accept the device of a "continuation" as a basis for omitting notice, we would endorse an exception when the Act contains none. Consequently, we find that the Council violated the Act by failing to give notice of its April 11 and April 16 closed sessions on the ESLC matter. The Council's response appropriately recognized the need to adopt new practices about notice when meetings are continued, so as to avoid future violations.

B. Closure Process

The complaint indicated that the Council failed to vote publicly to close the session on April 11 and 16. Based on the written statement prepared in closing the session submitted along with the complaint, there appears to have been unanimous consent for closure, albeit no actual motion or public vote. The Council did not specifically address this issue in its response, but the implication is that the publicly required vote was deemed unnecessary for the same reason that further notice was thought to be unnecessary: discussion of the ESLC proposal was merely a continuation of its earlier meetings.

We again disagree with the assumption that a continuation absolves a public body of compliance with another of the Act's flat requirements. "Before a public body meets in closed session, the presiding officer shall" see to the steps specified in §10-508(d)(2). These include the conduct of a recorded vote on the closing. §10-508(d)(2)(i). This requirement implies that those present must accept responsibility, then and there, for closing the session to the public. Thus, we have held that a public body may not vote to close a future session at a prior open meeting. 5 *OMCB Opinions* 160 (2007). We find that the Council violated the Act's requirement for a public vote to close the April 11 and April 16 sessions. Especially coupled with the failure to provide notice, the Council's practice was markedly at variance with the Act's required process.⁴

³ We accept, for discussion's sake, the Council's characterization of the meetings as having been "continued."

⁴ Although the complaint did not raise the question whether discussion of the ESLC matter was permitted to be done in closed session (assuming that the Act's procedures had been followed), we point out a problem in this regard. The written statement prepared on April 11, 2007, cited §10-508(a)(3), "[t]o consider the acquisition of real property for a (continued...)"

C. Access to Closure Statements

The complaint indicated that, on June 25, you requested a copy of the written statements completed at the time of closure of the April 11 and 16 meetings but were told that the documents were unavailable. You were given copies on July 2. The response did not address this allegation; thus, we shall assume for purposes of analysis that the facts presented in the complaint are accurate.⁵

The Act provides that these written statements are “a matter of public record.” §10-508(d)(4). Generally, a statement should be made available as soon as it has been completed. Anyone in the audience who wants to see it has a right to do so during the public portion of the meeting. This is necessary to effectuate the right of anyone present to object to the closing. §10-508(d)(3). A copy should be made available at that time if feasible or, at the latest, during the next business day. *Cf. 5 OMCB Opinions* 14, 16 (2006) (once approved, minutes of open meeting must be available on request during regular business hours). It follows, of course, that a copy is to be available as a matter of course to any requester for at least the one-year period during which the statement must be kept. §10-508(d)(5).

In this case, it appears that the documents were prepared in a timely way. However, when they were requested from the Council’s staff two months later, they were not made immediately available. A one-week delay in access to statements that are “a matter of public record” was a violation.

III**Conclusion**

In summary, the Council violated the Act in connection with closed sessions on April 11 and 16, 2007, by failing to (1) give proper public notice, (2) conduct a

⁴ (...continued)

public purpose and matters directly related thereto.” This appears to be the statutory basis under which the closed sessions involving the ESLC matter were conducted. Like all exceptions authorizing closure of a meeting under the Act, this exception must be strictly construed. §10-508(c). It is only available when a public body has authority to acquire the property in question and is considering whether to do so. 1 *OMCB Opinions* 233, 234 (1997). If the only property acquisition in question here involved the ESLC as sole purchaser, rather than the Town of Chestertown, this exception was inapplicable. Given the limited scope of the complaint, however, the fact that the Council did not have an opportunity to address this issue, and the possibility that one or more other exceptions might have applied, we do not rule on this point.

⁵ The Open Meetings Act authorizes the Compliance Board to consider a matter based on the facts available absent a written response. §10-502.5(c)(3).

vote to close in public, and (3) make a copy of its written closure statements available on request.

OPEN MEETINGS COMPLIANCE BOARD

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